

IMPEL ENERGY CORP.

IBLA 78-422

Decided August 16, 1979

Appeal from a decision of the Montana State Office, Bureau of Land Management, rejecting applications to lease for oil and gas. M 40069 (ND) Acq.-M 40083 (ND) Acq.

Reversed.

1. Acquired Lands – Mineral Leasing Act for Acquired Lands: Lands Subject to – Navigable Waters – Oil and Gas Leases: Acquired Lands Leases – Oil and Gas Leases: Lands Subject to – Submerged Lands – Tidelands

The Mineral Leasing Act for Acquired Lands does not exclude from oil and gas leasing those lands underlying the Missouri River within the boundaries of the Fort Berthold Indian Reservation as established by the Treaty of Fort Laramie (1851) and the Executive Order of Apr. 12, 1870, which were reacquired by the United States from the Indian tribes. The exclusion in the Act for submerged lands refers to submerged coastal lands, as set forth in 43 CFR 3101.2-1(g) (1978).

2. Navigable Waters

Prior to the admission of North Dakota to the Union on Nov. 8, 1889, the United States could grant lands underlying the Missouri River, a navigable river, to establish the Fort Berthold Indian Reservation. After said date, it could condemn or otherwise acquire these lands for construction of the Garrison Dam and Reservoir.

3. Indian Lands: Oil and Gas Leasing: Generally – Navigable Waters

The language of the Treaty of Fort Laramie and the Executive Order of Apr. 12, 1870, when considered with the case law and various utterances made contemporaneously with the Treaty, discloses an intention to include the lands underlying the Missouri River, insofar as it runs through the Fort Berthold reservation, among the lands of the reservation itself.

APPEARANCES: Ted J. Gengler, Esq., Donald T. Trinen, Esq., Fishman, Gengler & Geman, P.C., Denver, Colorado, for appellant; Allen I. Olson, Esq., Attorney General, Robert P. Brady, Esq., Assistant Attorney General, for State of North Dakota.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Impel Energy Corporation (Impel) appeals from a decision of the Montana State Office, Bureau of Land Management (BLM), dated April 19, 1978, rejecting its applications to lease for oil and gas, M 40069 (ND) Acq.-M 40083 (ND) Acq.

Appellant filed the above applications on March 10, 1978, seeking to lease a portion of the Missouri River bed in Dunn, McLean, Mountrail, McKenzie, and Mercer Counties, State of North Dakota. Appendix A contains a complete listing of the lands sought by Impel. These applications were submitted in accordance with the Act of August 7, 1947, commonly known as the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-359 (1976). The relevant portions of this Act state:

Except where lands have been acquired by the United States for the development of mineral deposits, by foreclosure or otherwise for resale, or reported as surplus pursuant to the provisions of the Surplus Property Act of 1944, all deposits of . . . oil . . . [and] gas . . . which are owned or may hereafter be acquired by the United States and which are within the lands acquired by the United States (exclusive of such deposits in such acquired lands as are . . . (b) tidelands or submerged lands) may be leased by the Secretary under the same conditions as contained in the leasing provisions of the mineral leasing laws, subject to the provisions hereof No mineral deposit covered by this section shall be leased except with the consent of the head of the executive department, independent establishment, or instrumentality having jurisdiction

over the lands containing such deposit, . . . and subject to such conditions as that official may prescribe to ensure the adequate utilization of the lands for the primary purposes for which they have been acquired or are being administered: Provided, that nothing in this chapter is intended, or shall be construed, to apply to, or in any manner affect any mineral right, exploration permits, leases or conveyances nor minerals that are or may be in any tidelands; or submerged lands

Each of appellant's 15 applications to lease for oil and gas was rejected in its entirety by the Montana State Office on the ground that the lands sought for leasing were not owned by the United States. BLM reached this conclusion after finding that the subject lands formed part of the bed of the Missouri River, a navigable river at the time of North Dakota's admission into the Union on November 8, 1889. Applying the long-standing doctrine enunciated in Pollard's Lessee v. Hagan, 44 U.S. 212 (1845), and Shively v. Bowlby, 152 U.S. 1 (1894), BLM held that lands underlying the Missouri River passed to the State of North Dakota on the date of its admission to the Union and hence were unavailable for Federal leasing.

[1] Impel appeals this decision and in so doing traces in some detail the history of the lands sought for leasing and the numerous cases which have issued on the subject. Prior to such a discussion, however, it is appropriate to examine whether the Mineral Leasing Act for Acquired Lands authorizes the leasing of oil and gas deposits which may be found in lands underlying navigable waters. The Act specifically provides:

[A]ll deposits of . . . oil . . . [and] gas . . . (exclusive of such deposits in such acquired lands as are . . . (b) tidelands or submerged lands) may be leased by the Secretary Provided, that nothing in this chapter is intended, or shall be construed, to apply to, or in any manner affect any mineral right, exploration permits, leases or conveyances nor minerals that are or may be in any tidelands; or submerged lands [Emphasis supplied.]

The term "submerged lands" is defined neither in the Act, nor in Chapter 29 of Title 43, entitled the Submerged Lands Act. It is possible, however, to gain some understanding of this term by referring to the legislative history of the Mineral Leasing Act for Acquired Lands.

Therein, at 1947 U.S. Code Cong. Service 1663, it is stated:

The committee has considered the question as to whether this bill would be applicable to, or in any way

affect, the so-called tidelands or submerged lands. The ownership of such lands has been the subject of litigation, which is now pending for decision in the Supreme Court of the United States (No. 12 original in the Supreme Court of the United States, October term 1946, United States of America, Plaintiff, v. State of California, Defendant). It is the judgment of this committee that this bill should not and does not apply to the tidelands or submerged lands, and it is not intended that such lands would be considered as "acquired lands," as defined in section 2 of this bill.

The litigation referred to in the above quotation involved the leasing of lands, minerals, and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the coast of California and outside of the inland waters of the State, extending seaward three nautical miles and bounded on the north and south, respectively by the northern and southern boundaries of the State of California.

From this brief excerpt from the legislative history, it is possible to conclude that the term "submerged lands" does not refer to lands underlying inland waters. This same conclusion can be reached by reexamining the Act and noting that the term "submerged lands" is listed among a group of terms which includes "tidelands, . . . lands underlying the three mile zone or belt, . . . [and] the continental shelf, adjacent or littoral to any part of the land within the jurisdiction of the United States of America." 30 U.S.C. § 352 (1976).

This conclusion is supported by the Department's regulation, 43 CFR 3101.2 (1978):

§ 3101.2 Acquired lands

§ 3101.2-1 Lands to which the Act does not apply.

.
(g) Which are tidelands, submerged coastal lands, within the continental shelf adjacent or littoral to any part of land within the jurisdiction of the United States.

Although the regulation is not a model of clarity, it is helpful to note that the term "submerged lands" in the Act has been replaced by the term "submerged coastal lands" in the regulation. The use of the word "coastal" leaves little doubt that lands under the Missouri River within the State of North Dakota, as in the instant case, were not meant to be excluded from leasing under the Act. Accordingly,

we hold that the Act is applicable to the present facts and proceed to the merits.

[2] By the Treaty of Fort Laramie (11 Stat. 549), signed September 17, 1851, the United States and certain assembled tribes of Indians "recognized and acknowledged" the territory of the Gros Ventre, Mandan, and Arickaree Nations in an area of land

commencing at the mouth of the Heart River; thence up the Missouri River to the mouth of the Yellowstone River; thence up the Yellowstone River to the mouth of Powder River in a southeasterly direction to the headwaters of the Little Missouri River; thence along the Black Hills to the Head of Heart River, and thence down Heart River to the place of beginning.

Treaty negotiations were held in part "to establish for each tribe some fixed boundaries, within which they should stipulate generally to reside" ^{1/} in an effort to avoid the costly internecine warfare among the various tribes. A treaty was also necessary to secure the right of free passage through Indian lands to the numerous travellers in search of gold in California and to reimburse the Indians for losses caused by the attendant loss of timber and game.

A question arose as to the validity of this treaty and although the treaty was later found to be ratified in the manner provided by law, ^{2/} an Executive Order was signed by President U.S. Grant on April 12, 1870, setting apart lands encompassing the subject lands as the Fort Berthold reservation for the same three tribes. This order reduced the number of acres set apart for the three tribes by some 4,686,612.43 acres. The construction of the Northern Pacific Railroad through the reservation further diminished its size. An Executive Order of July 13, 1880, withdrew 6,639,254.66 acres from the reservation to expedite railroad construction. A further reduction in size was authorized for the establishment of the Fort Buford Reservation, and on three occasions acreage was added to the original boundaries set forth in the Treaty of Fort Laramie. ^{3/}

Thereafter on July 31, 1947, Congress passed P.L. 296 appropriating sums for the acquisition of certain lands within the Fort Berthold

^{1/} 71 Ct. Cl. 308, 330-31 (1930).

^{2/} *Id.* at 336.

^{3/} *Id.* at 317, 335, 338. Additions were made by Executive Orders in 1870, 1880, and 1892. Impel's applications involve lands set apart by the Executive Order of April 12, 1870. "There were no subsequent executive orders or treaties concerning that particular area of the reservation prior to North Dakota's admission to the Union in 1889." Brief of State of North Dakota as Intervenor, January 9, 1979, p. 3.

reservation, "including all elements of value above or below the surface thereof" for construction of the Garrison Dam and Reservoir. This Act was followed on October 29, 1949, by P.L. 437, a joint resolution of Congress "[t]o vest title to certain lands of the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, in the United States, and to provide compensation therefor." Upon the acceptance of the terms of the resolution by the Gros Ventre, Mandan, and Arikaree, collectively known as the Three Affiliated Tribes, the subject lands became part of the Garrison Dam and Reservoir project. The lands remain part of this project and are presently administered by the Army Corps of Engineers.

Impel argues that the subject lands are Federally owned, because title to the lands was held by the United States in trust for the Indians of the Fort Berthold reservation from 1851 until title was transferred to the United States in 1949 to permit construction of the Garrison Dam and Reservoir. Hence, at no time, Impel argues, did title pass to the State of North Dakota.

The State of North Dakota, admitted as a party to this appeal by order of this Board, December 7, 1978, opposes Impel's position. North Dakota sets forth two arguments:

1. The subject lands vested in the State upon its admission to the Union and could not have been transferred to or held in trust for the tribes of the Fort Berthold Reservation.
2. If subject to transfer, whether outright or in trust, prior to statehood, the subject lands were not in fact transferred.

North Dakota cites to us the recent case, State Land Board v. Corvallis Sand and Gravel Co., 429 U.S. 363 (1977), wherein the Supreme Court reviewed the holding of Pollard's Lessee v. Hagan, *supra*:

In so holding, the Court established the absolute title of the States to the beds of navigable waters, a title which neither a provision in the Act admitting the State to the Union nor a grant from Congress to a third party was capable of defeating. [Footnote omitted.]

Thus under Pollard's Lessee the State's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself.

429 U.S. 374.

North Dakota argues that the United States was without the power to transfer the subject lands, whether outright or in trust, to the Fort Berthold Indians, because title to such lands was held by the

United States as trustee for the State of North Dakota until its admission to the Union. North Dakota claims that Corvallis modifies prior Supreme Court decisions on the subject, such as Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970), United States v. Holt State Bank, 270 U.S. 49 (1926), and Shively v. Bowlby, *supra*. In Shively, Mr. Justice Gray wrote:

[T]he navigable waters and the soils under them . . . shall not be granted away during the period of territorial government; but unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union.

152 U.S. 49-50. Inasmuch as Corvallis would seem to defeat any alienation of the bed of navigable waters by the United States, it would appear to be the strongest case in support of the State's position.

The modification which North Dakota detects, however, is more apparent than real. Corvallis, like Pollard's Lessee, examined the validity of transfers of lands under navigable waters which occurred after the territory encompassing such lands had been admitted to the Union. Hence, the validity of a prestatehood transfer was not under consideration. The language quoted above from Corvallis to the effect that Congress could not transfer lands under navigable waters is properly confined to similar facts. ^{4/} The instant appeal involves a prestatehood transfer.

Shively acknowledged that transfers could occur prior to statehood "in case of some international duty or public exigency." Therein Mr. Justice Gray further stated:

We cannot doubt, therefore, that Congress has the power to make grants of land below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the object for which the United States hold the Territory. [Emphasis supplied.]

152 U.S. 48.

^{4/} The broad language in Pollard's Lessee, *supra*, and Corvallis, *supra*, indicating that the United States could not make a grant of lands below high water mark prior to statehood was labeled "dictum" by Justice Marshall in his dissent in Corvallis at 390, n.11. This same sentiment was expressed by Justice Gray in his majority opinion in Shively v. Bowlby, 152 U.S. at 28.

In United States v. Winans, 198 U.S. 371 (1905), the Supreme Court found that a treaty reserving to the Yakima Nation a tract of land and the right of taking fish at all usual and accustomed places was a grant to carry out a public purpose appropriate to the objects for which the United States held the Territory. The treaty in question was made in 1859, some 30 years prior to the admission of the State of Washington to the Union.

In United States v. Alaska, 423 F.2d 764 (1970), an Executive Order withdrawing approximately 2,000,000 acres in Alaska for a wildlife refuge prior to Alaskan statehood was held to have been made "for a public purpose."

We hold that the Treaty of Fort Laramie and the Executive Order of April 12, 1870, both of which were made prior to the admission of North Dakota to the Union, were effective conveyances to carry out a public purpose appropriate to the objects for which the United States held the Territory.

The language from Corvallis cited by North Dakota is belied by a number of cases which acknowledge that lands underlying navigable waters can be transferred or withdrawn prior to the admission into the Union of the State wherein such lands lie. See, e.g., Prosser v. Northern Pacific Railroad, 152 U.S. 59 (1894) (Congressional grant to construct a railroad prior to Washington statehood); United States v. Winans, *supra* (treaty reserving lands for the Yakima Nation prior to Washington statehood); Montana Power Co. v. Rochester, 127 F.2d 189 (1942) (treaty reserving lands for the Flathead Indians prior to Montana statehood); Moore v. United States, 157 F.2d 760 (1946) (Executive Order reserving lands for the Quillayute tribe prior to Washington statehood); Choctaw Nation v. Oklahoma, *supra* (treaties and patents conveying lands to the Cherokee and Choctaw Nations prior to Oklahoma statehood); United States v. Alaska, *supra* (Executive Order establishing Kenai National Moose Range prior to Alaska statehood); Confederated Salish and Kootenai Tribes v. Namen, 380 F. Supp. 452 (1974); *aff'd*, 534 F.2d 1376 (1976) (treaty reserving lands for the Confederated Salish and Kootenai tribes prior to Montana statehood); United States v. Finch, 548 F.2d 822 (1976), *vacated*, 433 U.S. 676 (1977) (treaty reserving lands for the Crow tribe prior to Montana statehood), *but see* United States v. State of Montana, 457 F. Supp. 599 (1978).

Where prior to statehood, the United States has set apart or reserved lands underlying navigable waters, it may condemn or otherwise acquire such lands following statehood for construction of a water project. Montana Power Co. v. Rochester, *supra*; United States v. 5,677.94 Acres of Land, Etc., 162 F. Supp. 108 (1958); M-36887, June 3, 1974, re construction of the Grand Coulee Dam on the Colville and Spokane Indian reservations.

[3] Assuming, arguendo, that a prestatehood conveyance of lands underlying navigable waters was possible, North Dakota argues that the United States never expressed a clear intention to vest the bed of the Missouri River in the Three Affiliated Tribes. It points out that the Executive Order of April 12, 1870, signed by President Grant, merely "set apart as a reservation" certain lands without specific mention of the Missouri River bed. It quotes United States v. Holt State Bank, supra, for the proposition that "disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain."

The Executive Order of April 12, 1870, signed by President Grant states: "Let the lands indicated in the accompanying diagram be set apart as a reservation for the Arickaree, Gros Ventre, and Mandan Indians, as recommended in the letter of the Secretary of the Interior of the 12th instant." Article 5 of the Treaty of Fort Laramie states in part: "The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories" In United States v. Finch, supra, the Ninth Circuit found that the terms of the Treaty did not constitute a clear and unambiguous grant of lands from the Federal Government to the Indian tribes. It looked beyond the Treaty terms, however, to various communications by the United States to the Indians which referred to the territories as "your country," "your land," and "your territory." Similar references were found in internal Government correspondence. 548 F.2d at 829-30.

The issue of the ownership of the Missouri River bed has been before this Department before. In an opinion by Solicitor Margold and approved by First Assistant Secretary Walters in 1936, the Solicitor posed the question: "Was the bed of the Missouri River a part of that territory which was reserved to the Fort Berthold Indians prior to the admission of North Dakota to the Union?" His answer was equally straightforward: "I am of the opinion that the river bed, at the point in question, was part of the Fort Berthold Indian Reservation prior to the admission of North Dakota to statehood. The State of North Dakota, on its admission to the Union, expressly disclaimed all right and title to Indian lands. (Constitution of North Dakota, Article XVI, section 203.)" 55 I.D. 475, 479 (1936). In reaching his conclusion, the Solicitor relied in part on Donnelly v. United States, 228 U.S. 243 (1913), a case finding that the Klamath River bed was part of the Hoopa Valley Reservation.

In construing the terms of the Treaty and subsequent Executive Order, we are reminded of the rule of construction in favor of the Indians:

The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length

transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them, see, e.g., Jones v. Meehan, 175 U.S. 1, 11 (1889), and any doubtful expressions in them should be resolved in the Indians' favor.

Choctaw Nation v. Oklahoma, *supra*, at 630-31.

Courts have regularly found that lands underlying navigable waters were included by the terms of Federal treaties or Executive Orders establishing an Indian reservation. Among them: Montana Power Co. v. Rochester, *supra*; United States v. Finch, *supra*; Confederated Salish and Kootenai Tribes v. Namen, *supra*.

We find that the language of the Treaty of Fort Laramie and the Executive Order of April 12, 1870, when considered with the case law and the various utterances made contemporaneously with the treaty, discloses an intention to include the lands underlying the Missouri River, insofar as it runs through the Fort Berthold reservation, among the lands of the reservation itself. The import of this finding is that title to the lands which Impel seeks to lease for oil and gas has never passed to the State of North Dakota. Accordingly, we hold that the reasoning set forth in BLM's decision of April 19, 1978, will not support rejection of Impel's applications to lease for oil and gas.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the applications are remanded to BLM for their further consideration consistent herewith.

Douglas E. Henriques
Administrative Judge

We concur.

Joan B. Thompson
Administrative Judge

Frederick Fishman
Administrative Judge

APPENDIX A

M 40069(ND) Acq.	T. 146 N., R. 87 W.,	Parts of secs.
5th P.M.	5 and 6	
	T. 147 N., R. 87 W.,	Parts of secs.
5th P.M.	22, 23, 24, 26,	
	27, 28, 29, 31,	
	32, and 33	
M 40070(ND) Acq.	T. 146 N., R. 88 W.,	Parts of secs.
5th P.M.	1, 2, 3, 4,	
	and 5	
	T. 147 N., R. 88 W.,	Parts of secs.
5th P.M.	19, 29, 30, 31,	
	32, 33, 34, 35,	
	and 36	
M 40071(ND) Acq.	T. 147 N., R. 89 W.,	Parts of secs.
5th P.M.	5, 6, 7, 8, 9,	
	15, 16, 17, 22,	
	23, and 26	
M 40072(ND) Acq.	T. 147 N., R. 89 W.,	Parts of secs.
5th P.M.	24 and 25	
M 40073(ND) Acq.	T. 147 N., R. 90 W.,	Parts of secs.
5th P.M.	1, 2, 3, 6, 7,	
	8, 9, 10, and 11.	
M 40074(ND) Acq.	T. 147 N., R. 91 W.,	Parts of secs.
5th P.M.	1, 2, and 12	
M 40075(ND) Acq.	T. 148 N., R. 91, W.,	Parts of secs.
5th P.M.	3, 4, 9, 10,	
	15, 16, 22, 26,	
	27, 35, and 36	
M 40076(ND) Acq.	T. 149 N., R. 90 W.,	Parts of secs.
5th P.M.	19, 30, and 31	
	T. 149 N., R. 91 W.,	Parts of secs.
5th P.M.	1, 2, 11, 12,	
	13, 24, 25, and	
	36	
M 40077(ND) Acq.	T. 149 N., R. 91 W.,	Parts of sec.
5th P.M.	6	

M 40077(ND) Acq. T. 150 N., R. 91 W., Parts of secs.
 (continued) 5th P.M. 20, 21, 22, 27,
 28, 29, 30, 31

M 40078(ND) Acq. T. 149 N., R. 91 W., Parts of secs.
 5th P.M. 1 and 2

T. 150 N., R. 90 W., Parts of secs.
 5th P.M. 30 and 31

T. 150 N., R. 91 W., Parts of secs.
 5th P.M. 23, 24, 25,
 33, 34, and 36

M 40080(ND) Acq. T. 150 N., R. 93 W., Parts of secs.
 5th P.M. 7, 16, 17, 18,
 19, 20, 21, 25,
 26, 27, and 28

M 40081(ND) Acq. T. 150 N., R. 94 W., Parts of secs.
 5th P.M. 1 and 12

M 40082(ND) Acq. T. 151 N., R. 93 W., Parts of secs.
 5th P.M. 5, 6, 7, 18,
 30, and 31

T. 151 N., R. 94 W., Parts of secs.
 5th P.M. 12, 13, 24,
 25, and 36

M 40083(ND) Acq. T. 152 N., R. 93 W., Parts of secs.
 5th P.M. 10, 11, 14,
 15, 22, 23, 27,
 28, 31, 32, and
 33

